OCT 28 1953
HAROLD B. WILLEY, Clerk

No. 372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

CITY OF GALVESTON, *Petitioner*,
VERSUS
DOLORES R. MIRANDA AND 130 LIBELLANTS, *Respondents*
and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION, *Respondent*
and
SOUTHERN STEVEDORING CO. INC., *Respondent*

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR TEXAS EMPLOYERS' INSURANCE ASSOCIATION IN OPPOSITION

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ALPHA LAW BRIEF CO., HOUSTON

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SOUTHERN STEVEDORING CO. INC., *Respondent*

BRIEF IN OPPOSITION TO PETITION ON BEHALF OF RESPONDENT, TEXAS EMPLOYERS' INSURANCE ASSOCIATION

TO THE HONORABLE JUDGES OF SAID COURT:

Petitioner, City of Galveston, seeks a writ of certiorari to review one single point involved in this case. The question presented, as stated in the petition, relates only to the City of Galveston and this respondent, Texas Employers' Insurance Association, and not to any of the other parties.

Respondent asserts that the petition presents only an abstract and academic point, the decision of which, either one way or the other, will in no manner affect the ultimate disposition of the litigation and that the question presented is of no general interest. Presentation of respondent's position requires a full disclosure of the facts.

Statement

The City of Galveston, Texas, owns and operates for profit a commercial waterfront grain elevator in the City of Galveston. One of the primary functions of the elevator is to load cargoes into ocean-going vessels. It is frequently necessary to apply a poisonous fumigant to grain stored in the elevator for the purpose of killing weevils.

On or about August 7, 1949, the SS LIPSCOMB LYKES was at the grain elevator for the purpose of taking on a partial cargo of grain for foreign destination. The owners of the vessel, Lykes Bros. Steamship Co., Inc., employed Southern Stevedoring Co., Inc., an independent contracting stevedore, to furnish longshoremen to trim the grain after it reached the vessel from the elevator. While grain from the elevator was being loaded into the LIPSCOMB LYKES, a large number of longshoremen, including all of the individuals who were libellants in this case, sustained serious personal injuries as a result of inhaling fumigants placed on the grain by the City of Galveston.

The injuries occured on board a vessel upon the navigable waters of the United States and were thus subject to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S. C.A. 901. The liability of the injured longshoremen's employer, Southern Stevedoring Co., Inc., had been insured with the Texas Employers' Insurance Association under the Longshoremen's and Harbor Workers' Compen-

sation Act, and Texas Employers' Insurance Association paid the individuals who were libellants in this case various amounts of compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, and in addition thereto, afforded the necessary medical and hospital attention.

Dolores R. Miranda and 130 other individual longshoremen brought a libel against the City of Galveston alleging that various negligent acts and omissions (R. 8-29) on the part of the City caused or contributed to cause the illnesses and injuries sustained by libellants while employed as longshoremen on the LIPSCOMB LYKES. The doctrine of res ipsa loquitur was also relied upon (R. 21). Thereafter, other longshoremen intervened, making a total of 142 individual libellants.

In the original libel (R. 28, par. XXV), libellants alleged that Texas Employers' Insurance Association had paid various amounts of compensation to libellants and medical and hospital expenses for their benefit, and prayed that Texas Employers' Insurance Association be cited to appear and assert its subrogation rights. Texas Employers' Insurance Association appeared and answered, and in addition thereto, filed a cross-libel against the City of Galveston seeking to recover compensation payments it had made to libellants and medical and hospital expenses expended for their benefit, altogether amounting to $60,000, together with its reasonable expenses in enforcing such liability, together with attorneys' fees, interest and costs (R. 31-38).

A trial was had upon the issue of liability before the United States District Court at Galveston, commencing on April 14, 1952, and ending on June 12, 1952. On July 16, 1952, the Trial Court filed findings of fact and conclusions of law (R. 133-152) and, among other things, the Trial Court found the City negligent in (1) placing excessive quanti-

ties of fumigant on the grain that went into the LIPSCOMB LYKES and in failing to properly aerate such grain, (2) in failing to properly test the grain for dangerous concentrations of fumigant, (3) in failing to warn libellants and (4) in permitting the highly dangerous and poisonous fumigant to enter the holds of the LIPSCOMB LYKES and in other particulars of a similar nature (R. 142-143). The Trial Court also found that a case was made out under the doctrine of *res ipsa loquitur* (R. 149).

On September 10, 1952, an interlocutory decree (R.152-155) was entered, which, after holding the City negligent and liable for the damages sustained by libellants, awarded Texas Employers' Insurance Association judgment against the City of Galveston for such amounts as might be due it. The amount to which each libellant and Texas Employers' Insurance Association was entitled to recover was, in accordance with the usual admiralty practice, severed from the trial of the issue of liability.

An appeal was perfected by the City to the United States Court of Appeals, Fifth Circuit. While the appeal was pending, the City of Galveston made settlement with all of the individual libellants, paying them and their attorneys the sum of $170,000, but did not settle with Texas Employers' Insurance Association, and filed motions to dismiss the appeal as to the City and all of the individual libellants (R. 1580-1584 and 1603-1605). Thereafter, Texas Employers' Insurance Association filed a motion and an amended motion to dismiss the appeal, or in the alternative, for entry of judgment for other relief (R. 1585-1590). Only one of these two motions is brought here in the record by petitioner; respondent's amended motion, sustained below, is omitted.

When the City settled with the individual libellants, some or all of the parties who participated in those settlements

apparently asserted that the settlements would render the libellants liable to Texas Employers' Insurance Association, for as part of the settlements, the City of Galveston agreed to indemnify every libellant and their attorneys from any and every claim or demand asserted by Texas Employers' Insurance Association. This indemnity was before the Court of Appeals but has not been brought here in the record by petitioner, and a copy is attached hereto as "Appendix A".

The case was argued in the Court of Appeals on both the motions of Texas Employers' Insurance Association and the merits of the case at the same time, and thereafter, the Court of Appeals rendered judgment in all things affirming the judgment of the Trial Court (R. 1623-1629), reported under CITY OF GALVESTON V. MIRANDA, ET AL., 205 F. 2d 468.

The motions to dismiss the appeal as to the City and the individual libellants that were filed by the City of Galveston and all of the individual libellants, were granted.

The judgment of the Court of Appeals (R. 1629), entered June 26, 1953, contained, in part, the following:

> "This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;
>
> "On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is herby, affirmed; * * * *"

Texas Employers' Insurance Association was also awarded judgment against each of the libellants and their proctors.

No complaint is made in the petition as to the affirmance of the Trial Court's findings that the City was negligent and hence liable to Texas Employers' Insurance Associa-

tion. The only question sought to be reviewed is the effect of the settlements between the City of Galveston and the individual libellants insofar as such settlements affected the rights of Texas Employers' Insurance Association.

Argument

It is respondent's view that if this Honorable Court should grant the petition for writ of certiorari and should then find itself in disagreement with the Court of Appeals insofar as the question presented in the petition is concerned, the ultimate outcome of this litigation would in no manner be affected. Texas Employers' Insurance Association now has a valid, affirmed judgment against the City of Galveston on the basic issue of negligence, and no review of that basic issue on which liability was imposed by the Trial Court, and affirmed by the Court of Appeals, is sought here. Accordingly, if this Court should feel that the settlements made by the libellants with the City of Galveston did not in and of themselves entitle Texas Employers' Insurance Association to a decree against the City, the judgment would nevertheless stand on other grounds. The Trial Court found the City guilty of negligence and awarded Texas Employers' Insurance Association its recovery. That decree was affirmed by the Court of Appeals both on the merits and by reason of the setlements.

A simple illustration of our point would be a case where a plaintiff recovered a judgment against a motor vehicle operator who was found by the Trial Court to be negligent both in excessive speed and failure to keep a proper lookout, and an appeal on the sole ground that the evidence was insufficient to sustain the finding of excessive speed, but without any complaint as to the finding of a failure to keep a proper lookout. No matter what a reviewing court might do with the single question of excessive speed, the

judgment would, nevertheless, have to be affirmed on the finding of insufficient lookout, and we do not think this Court would review a case where its decision would settle nothing between the parties.

In addition to the affirmed basic issue of negligence, the City of Galveston, if for no other reason, will eventually pay Texas Employers' Insurance Association the monies it is entitled to receive by reason of the indemnity agreement appended hereto as "Appendix A." The libellants have not petitioned for a writ of certiorari and the judgment below in favor of Texas Employers' Insurance Association as against each and every libellant and their attorneys is now forever final and binding. So, even if it be assumed that Texas Employers' Insurance Association is not entitled to a direct judgment against the City of Galveston, the City will ultimately pay under the indemnity agreement.

This Court will not decide moot, abstract or academic questions. Recent examples are ROSARIO ST. PIERRE v. UNITED STATES OF AMERICA, 319 U.S. 41, 87 L. Ed. 1199, where in a *per curiam* opinion, the Court stated:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. United States v. Alaska S.S. Co., 253 U.S. 113, 115, 116, 64 L. Ed. 808, 809, 810, 40 S. Ct. 448, and cases cited; United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft Co., 238 U.S. 466, 475-477, 60 L. Ed. 387, 391, 392, 36 S. Ct. 212."

The same rule is followed in the more recent case of AMALGAMATED ASSOCIATION OF STREET, ELECTRIC, RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998 v. WISCONSIN EMPLOYMENT RELATIONS BOARD, 340 U.S. 416, 95 L.Ed. 389, a unanimous decision.

The academic nature of the "Question Presented" (Petition, 4) is illustrated and enhanced by the fact that it does not even present a question that is involved in the case below, or here. The question made by the record is not whether a settlement with one of two claimants renders the cause moot as to the non-settling claimant, but whether a claimant who has received compensation benefits and a third-party defendant can settle the claim without becoming liable to the compensation carrier who is entitled to recoup its outlay in the first instance. In the case supported by the record, there is only one indivisible cause of action (STANDARD OIL COMPANY OF TEXAS v. SWINNEY, 201 F. 2d 133) while the broad, general "Question Presented" could cover a multitude of other and different situations.

A further and separate reason for denying the writ is that the question presented was correctly decided in the court below, and the petition presents no question of importance for the decision of this Court. All of the cases in point or analogous to the case at bar are in accord with the decision of the Court of Appeals. See THE AETNA, 138 F. 2d 37 by the Court of Appeals for the Third Circuit; FONTANA v. PENNSYLVANIA R. Co., 106 F. Supp. 461, affirmed without opinion by the Court of Appeals, Second Circuit, June 22, 1953, 205 F. 2d 151, 1953 A.M.C. 1258. The state court cases are generally in accord. In fact, in a similar situation, the Supreme Court of Texas, in TRADERS & GENERAL INSURANCE COMPANY v. WEST TEXAS UTILITIES COMPANY, 140 Tex. 57, 165 S.W. 2d 713, has said:

> "The compromise settlement was made with full knowledge on the part of the settlers of the association's subrogation rights. While the alleged cause of action against the company belonged to the injured employee he owned it burdened 'by the right of the association to recoup itself for compensation paid * * *.'

> * * * The money paid over to the employee therefore belonged, under the law, to Traders & General and both the company and the employee were charged with knowledge of that fact and had actual knowledge that Traders & General was asserting its subrogation rights in the cause at the time the settlement was made. *The right of the association to reimburse out of the first money paid is statutory:* (Emphasis by the Court)
>
> * * * The money belonging to Traders & General was wrongfully paid by the utilities company to the employee, who wrongfully received it, and both were thereby rendered liable to pay to Traders & General the amount of compensation theretofore paid by it to the employee, together with the costs of enforcement, including a reasonable attorney's fee therefor."

It is noteworthy that the petitioner cites no case as being contrary to the decision below.

Petitioner asserts that the decision below is in derogation of compromise and settlement. Not so. Settlements were made with libellants on what petitioner asserts were very favorable terms, less than ten cents (10c) on the dollar (Brief in Support of Petition, 8). In addition, it willingly agreed to indemnify libellants against respondent's claims (Appendix A).

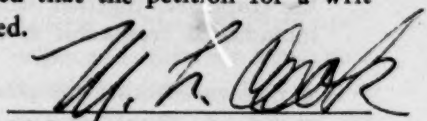
Petitioner also asserts that the decision below permits insurance companies to "bludgeon" longshoremen into "farcical" settlements and in general is too favorable to insurance companies. Again, not so. All the insurance companies will receive is what is given them by the Longshoremen's and Harbor Workers' Compensation Act and long-known equitable principles. The City should not complain. Its negligence required respondent to expend what it seeks to recover. No longshoreman is here complaining.

Petitioner prays for a reversal for a determination on the

merits. The Court of Appeals has already reviewed the case on the merits and in so doing, in all things affirmed the Trial Court.

We believe the petition herein, particularly in light of the additional facts brought forward in this brief, demonstrates that the petition is so completely devoid of merit that it appears to have been sued out merely for delay and, accordingly, this respondent respectfully prays the Court that in denying the petition, it award respondent damages at a rate not exceeding ten per cent (10%) in accordance with Rule 30.

It is respectfully submitted that the petition for a writ of certiorari should be denied.



M. L. Cook,
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APPENDIX "A"

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, the BOARD OF TRUSTEES OF THE GALVESTON WHARVES in settlement and discharge of their claims against the CITY OF GALVESTON asserted in the action in Admiralty numbered and designated as "A. D. 1909 DOLORES MIRANDA ET AL. v. CITY OF GALVESTON ET AL." on the docket of the United States District Court for the Southern District of Texas, as its Galveston Division, has paid to each of the libellants in that action and their respective attorneys a sum of money, and has agreed to indemnify and save each of them harmless on any claim to the respective sums so paid, or any part thereof, which may be asserted by Texas Employers Insurance Association, Southern Stevedoring Company, Inc., of Lykes Bros. Steamship Company, Inc., or any of them;

NOW, THEREFORE, for and in consideration on the release of the CITY OF GALVESTON and the BOARD OF TRUSTEES OF THE GALVESTON WHARVES from all further liability on the above mentioned claims, the BOARD OF TRUSTEES OF THE GALVESTON WHARVES, acting as an agency of the CITY OF GALVESTON, hereby agrees with F. Fox Benton, Owen D. Barker, Griffith D. Lambdin, Maurice A. Lehmann and E. W. Newman, their law partners and the legal representatives of their past or present law partners, acting for themselves and as attorneys and representatives of, and for and in behalf of, the persons represented by them as attorneys of record, in the above mentioned action in Admiralty, that the BOARD OF TRUSTEES OF THE GALVESTON WHARVES and its successors will indemnify and save harmless each of such attorneys and their legal representatives and each of such libellants in that action against each

and every claim or demand asserted by Texas Employers Insurance Association, Southern Stevedoring Company, Inc., or Lykes Bros. Steamship Company, Inc., or any of them, against him or his heirs, executors, or administrators for the amount of money, or any part thereof, paid to him, or his attorneys, by the BOARD OF TRUSTEES OF THE GALVESTON WHARVES in satisfaction of, and for the release of, his claims for injuries suffered aboard the S.S. Lipscomb Lykes, on or about August 8, 1949, at the Port of Galveston.

It is further agreed that the BOARD OF TRUSTEES OF THE GALVESTON WHARVES and its successors, at its cost and expense, will defend any such claim through its attorneys if notice thereof be given it within ten (10) days after it may be asserted in suit, and that such Board will not be liable hereunder to indemnify against any claim which it is not so given an opportunity to defend.

It is further agreed that the pending appeal in the above-mentioned action will be dismissed as to each libellant in such action, who shall have released his claim asserted therein against the CITY OF GALVESTON prior to the submission thereof in the Appellate Court.

It is stipulated that this obligation as it applies to each of the respective libellants is conditioned on the delivery to the law firm of Williams & Thornton of a release by the respective libellants or his heirs or legal representative and his attorneys of record in the above-mentioned action in Admiralty of said libellant's claim therein asserted against the City of Galveston; it being understood that this indemnity agreement shall not apply in favor of any libellant who has not delivered such release as aforesaid.

It is further stipulated that there shall be no personal liability of the members of the BOARD OF TRUSTEES OF

THE GALVESTON WHARVES hereunder, and that payment of any obligation arising hereunder can be enforced only against money arising from the operation of the wharf and terminal facilities under the management and control of the BOARD OF TRUSTEES OF THE GALVESTON WHARVES and its successors as an agency of the CITY OF GALVESTON.

IN WITNESS WHEREOF, the BOARD OF TRUSTEES OF THE GALVESTON WHARVES has caused the execution hereof by its Vice-Chairman, this 5th day of February, 1953.

BOARD OF TRUSTEES
OF THE GALVESTON WHARVES

By /s/ E. H. THORNTON
Vice Chairman

ATTEST:
/s/ L. B. BERNDT
Secretary
(SEAL—THE GALVESTON WHARVES)